JUSTICE
ACTUALITÉS REPORT

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ANADIAN CRIMINAL JUSTICE ASSOCIATION •• ASSOCIATION CANADIENNE DE JUSTICE PÉNALE

JUSTICE
ACTUALITÉS REPORT

Volume 27 No. / N° 1

The **JUSTICE REPORT** contains information of value to Association readers and the public interested in matters related to the administration of justice in Canada. Opinions expressed in this publication do not necessarily reflect the Association's views, but are included to encourage reflection and action on the criminal justice system throughout Canada. For more information on the activities of the CCJA, please contact: •• L'**ACTUALITÉS-JUSTICE** renferme des renseignements utiles aux lecteurs de l'Association et au public qui s'intéressent aux questions relatives à l'administration de la justice au Canada. Les opinions qui sont exprimées ne reflètent pas nécessairement les vues de l'Association, mais y figurent afin d'encourager à réfléchir et à agir sur la justice pénale dans tout le Canada. Pour obtenir de plus amples renseignements sur les activités de l'Association, veuillez communiquer avec :

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EDITORIAL

BY IRVING KULIK,
CCJA EXECUTIVE DIRECTOR

As I write this editorial I am reminded of the expression: "May you live in interesting times". Our times are certainly interesting today, around the world and in many ways. When we focus specifically on our area of interest, criminal justice, we continue to read statistical reports that point to declining rates of crime in most parts of the country for both adults and youth. While different survey methodologies can come to somewhat varied results, none have led to conclusions that contradict the overall declines in criminality. One must conclude that, unlike many dangerous places in the world, Canada is a safe country.

Yet, over the course of the last several years, proposed criminal justice legislation seems to be seeking solutions to a perceived rising rate of crime. CCJA, through its Policy Review Committee, has submitted briefs in response to most bills tabled during this time, as well as testifying before parliamentary committees. Currently, a number of the government's past proposals have been consolidated into Bill C-10, the Safe Streets and Communities Act, which is close to final enactment. When you read this issue of the Justice Report, I expect that key sections of the Act will already be in force.

CCJA has always tried to take a helpful, constructive approach to draft legislation. Indeed, over the course of much of our 92 years of existence, we have offered non-partisan, independent advice to different governments. We do not expect that our advice will always be followed; such is the nature of a democracy. We are, however, frequently asked to testify and do expect to be listened to respectfully. Regarding C-10, like other legislation, we have found sections that we can support, some that we recommend be modified and, unfortunately, some others we must reject entirely.

The purpose of criminal justice legislation ultimately must have one principal goal: public safety. Perhaps other ancillary objectives can be attained, although few can easily be rationalized. In the current context, the government is probably responding to public perception and fear in some quarters of our country. We would not deny the perceptions of segments of our population; yet, are these not best served through public education rather than expensive legislation? In fact, the need for serious efforts to educate the public regarding criminal justice has been called for by past parliamentary committees, but to little avail. Given the opportunity, CCJA could certainly assist in that regard.

Canada is a relatively wealthy, prosperous country. In spite of this we face significant economic challenges over the next while. This has been recognized for some years now by the current government. Studies and reviews are ongoing in order to identify areas where significant savings in government expenditures must be made. Estimates of future budgetary cuts range from four- to eight-billion dollars annually. In the current context, we are facing an aging population, never-ending health cost increases, challenges within our native population and our expanding international obligations, to name but a few. How much more can we afford to expend on criminal justice infrastructure expansion, namely prisons and penitentiaries, if, as we expect, such expenditures will not result in any greater public safety?

The Canadian Criminal Justice Association represents over seven hundred members across the country, from coast to coast to coast. Our membership includes professionals from all facets of the criminal justice system. I believe we can continue to provide quality advice to the government. As we live through these interesting times, I hope our advice will be appreciated and valued.

I wish you all the best in the 2012. May we all continue to live in a safe and healthy Canada.

ÉDITORIAL

PAR IRVING KULIK,
DIRECTEUR GÉNÉRAL, ACJP

Au moment de rédiger cet éditorial, une citation me vient à l'esprit : « Puissiez-vous vivre à une époque intéressante. » Nous vivons certes en des temps intéressants, partout dans le monde et de bien des manières. Lorsque nous nous centrons de manière particulière sur notre champ d'intérêt, la justice pénale, nous continuons de prendre connaissance de rapports statistiques qui mettre en évidence une baisse des taux de criminalité dans la plupart des régions du pays, tant ceux des adultes que ceux des jeunes. Bien que diverses méthodologies d'enquête puissent parvenir à des résultats quelque peu différents, aucune enquête n'est encore arrivée à une conclusion contredisant l'existence d'une baisse généralisée de la criminalité. Il nous faut donc conclure que le Canada est un pays sûr, contrairement à certaines régions dangereuses du monde.

Pourtant, depuis plusieurs années, les lois proposées en matière de justice pénale apparaissent comme une réaction à une hausse perçue de la criminalité. L'ACJP, par le truchement de son Comité d'examen des politiques, a présenté des mémoires en réponse à la plupart des projets de loi déposés au cours de cette période, en plus de comparaître devant divers comités parlementaires. À l'heure actuelle, plusieurs propositions passées du gouvernement ont été insérées dans le projet de loi C-10, Loi sur la sécurité des rues et des communautés, qui devrait être promulguée sous peu. Je soupçonne qu'au moment où vous lirez ce numéro d'Actualités-Justice, les principales dispositions de cette Loi seront déjà en vigueur.

L'ACJP s'est toujours efforcée d'examiner les projets de loi de manière utile et constructive. En effet, au cours de la plupart de nos quelque 92 années d'existence, nous avons offert des conseils non partisans et indépendants à divers gouvernements. Nous ne nous attendons pas à ce que nos conseils soient toujours suivis, ainsi en est-il en démocratie. Nous sommes, toutefois, fréquemment invités à témoigner et nous nous attendons à ce qu'on nous écoute respectueusement. Dans le cas de C-10, comme dans celui d'autres projets de loi, nous avons trouvé certains articles que nous sommes en mesure d'appuyer, d'autres auxquels nous recommandons d'apporter certaines modifications et d'autres encore auxquels nous devons nous opposer complètement.

En définitive, les lois en matière de justice pénale doivent avoir un but premier : protéger la population. Peut-être pourrait-on y greffer d'autres objectifs accessoires, mais peu d'entre eux peuvent logiquement être liés à l'objectif premier. Dans le contexte actuel, il est probable que le gouvernement réagit aux perceptions et à la peur dans certains segments de la population au pays. On ne peut pas ignorer les perceptions de certains segments de la population, mais ne serait-il pas plus constructif de s'y attaquer au moyen de l'éducation publique plutôt qu'en adoptant des lois coûteuses? En fait, par le passé, divers comités parlementaires ont fait ressortir le besoin d'efforts sérieux d'éducation du public en matière de justice pénale, mais cela n'a pas servi à grand-chose. L'ACJP pourrait certes jouer un rôle à cet égard, si on lui en fournissait l'occasion.

Le Canada est un pays relativement riche et prospère. Malgré cela, nous aurons à surmonter certains obstacles économiques d'importance dans un avenir rapproché. Le gouvernement actuel a reconnu cet état de fait depuis quelques années déjà. Des études et des examens sont en cours, ayant comme objectif de dégager les secteurs où il s'impose de réduire considérablement les dépenses gouvernementales. Les estimations des compressions budgétaires à venir varient de quatre à huit milliards de dollars annuellement. Nous devons aujourd'hui composer avec divers problèmes : une population vieillissante, une augmentation constante des coûts en santé, divers défis au sein de notre population autochtone, et nos obligations internationales croissantes, pour n'en nommer que quelques-uns. Combien aurions-nous les moyens d'investir de plus pour l'expansion de l'infrastructure de justice pénale, en l'occurrence les prisons et les pénitenciers si, comme nous le prévoyons, des investissements du genre n'auront pas pour effet de contribuer à une sécurité accrue de la population?

L'Association canadienne de justice pénale représente plus de sept cents membres au pays, d'un océan à l'autre. Nos membres incluent des professionnels de tous les secteurs du système de justice pénale. Je crois que nous sommes en mesure de continuer d'offrir des conseils de qualité au gouvernement. J'espère que nos conseils seront bien accueillis et appréciés, alors que nous traversons cette époque intéressante.

J'offre mes meilleurs vœux à tous pour 2012. Puissions-nous continuer de vivre dans un Canada sûr et en santé.

BILL C-10

10 REASONS TO OPPOSE

THE CANADIAN BAR ASSOCIATION

"The Canadian Bar Association, representing over 37,000 lawyers across the country, has identified 10 reasons why the passage of Bill C-10 will be a mistake and a setback for Canada.

1. Ignoring reality. Decades of research and experience have shown what actually reduces crime: (a) addressing child poverty, (b) providing services for the mentally ill and those afflicted with FASD, (c) diverting young offenders from the adult justice system, and (d) rehabilitating prisoners, and helping them to reintegrate into society. Bill C-10 ignores these proven facts.

2. Rush job. Instead of receiving a thorough review, Bill C-10 is being rushed through Parliament purely to meet the "100-day passage" promise from the last election. Expert witnesses attempting to comment on over 150 pages of legislation in committee hearings are cut off mid-sentence after just five minutes.

3. Spin triumphs over substance. The federal government has chosen to take a "marketing" approach to Bill C-10, rather than explaining the facts to Canadians. This campaign misrepresents the bill's actual content and ensures that its public support is based heavily on inaccuracies.

4. No proper inspection. Contrary to government claims, some parts of Bill C-10 have received no previous study by Parliamentary committee. Other sections have been studied before and were changed – but, in Bill C-10, they're back in their original form.

5. Wasted youth. More young Canadians will spend months in custodial centres before trial, thanks to Bill C-10. Experience has shown that at-risk youth learn or reinforce criminal behaviour in custodial centres; only when diverted to community options are they more likely to be reformed.

6. Punishments eclipse the crime. The slogan for one proposal was Ending House Arrest for Serious and Violent Criminals Act, but Bill C-10 will actually also eliminate conditional sentences for minor and property offenders and instead send those people to jail. Is roughly $100,000 per year to incarcerate someone unnecessarily a good use of taxpayers' money?

7. Training predators. Bill C-10 would force judges to incarcerate people whose offences and circumstances clearly do not warrant time in custody. Prison officials will have more latitude to disregard prisoners' human rights, bypassing the least restrictive means to discipline and control inmates. Almost every inmate will re-enter society someday. Do we want them to come out as neighbours, or as predators hardened by their prison experience?

8. Justice system overload. Longer and harsher sentences will increase the strains on a justice system already at the breaking point. Courts and Crown prosecutors' offices are overwhelmed as is, legal aid plans are at the breaking point, and police forces don't have the resources to do their jobs properly. Bill C-10 addresses none of these problems and will make them much worse.

9. Victimizing the most vulnerable. With mandatory minimums replacing conditional sentences, people in remote, rural and northern communities will be shipped far from their families to serve time. Canada's Aboriginal people already represent up to 80% of inmates in institutions in the prairies, a national embarrassment that Bill C-10 will make worse.

10. How much money? With no reliable price tag for its recommendations, there is no way to responsibly decide the bill's financial implications. What will Canadians sacrifice to pay for these initiatives? Will they be worth the cost?

Canadians deserve accurate information about Bill C-10, its costs and its effects. This bill will change our country's entire approach to crime at every stage of the justice system. It represents a huge step backwards; rather than prioritizing public safety, it emphasizes retribution above all else. It's an approach that will make us less safe, less secure, and ultimately, less Canadian" (The Canadian Bar Association, 2011).

The Canadian Bar Association. (2011).
10 Reasons to Oppose Bill C-10. Ottawa, ON: Author.
Retrieved from http://www.cba.org/cba/blastemail/pdf/10_reasons_to_oppose.pdf

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PROJET DE LOI C-10

10 RAISONS DE S'OPPOSER

L'ASSOCIATION DU BARREAU CANADIEN

" L'Association du Barreau canadien, qui représente plus de 37 000 juristes dans l'ensemble du Canada, a identifié 10 raisons pour lesquelles l'adoption du projet de loi C-10 serait une erreur et un recul pour le Canada.

1. Mépris de la réalité. Des décennies de recherches et d'expérience ont démontré ce qui réduit réellement le crime : (a) s'attaquer à la pauvreté chez les enfants; (b) fournir des services pour les personnes atteintes de maladies mentales et des troubles causés par l'alcoolisation foetale; (c) écarter les jeunes délinquants du système de justice pour adultes; et (d) réadapter les détenus et les aider à se réinsérer dans la société. Le projet de loi C-10 ne tient aucun compte de ces faits établis.

2. Projet précipité. Au lieu de bénéficier d'un examen rigoureux, le projet de loi C-10 est soumis à un cheminement parlementaire accéléré dans le seul but de respecter la promesse électorale qu'il serait adopté dans un délai de 100 jours. Les témoins experts tentant de commenter les plus de 150 pages de mesures législatives aux audiences du comité sont interrompus en pleine phrase après à peine cinq minutes.

3. Un exercice de marketing, sans plus. Le gouvernement a choisi d'adopter une approche « marketing » à l'égard du projet de loi C-10, plutôt que d'expliquer les faits aux Canadiens. Cette campagne déforme le contenu véritable du projet de loi et s'appuie largement sur des inexactitudes pour rallier l'appui du public.

4. Une analyse insuffisante. Contrairement à ce que soutient le gouvernement, certaines parties du projet de loi C-10 n'ont reçu aucun examen en comité parlementaire. D'autres parties ont été étudiées et avaient été modifiées, mais sont réapparues dans le projet de loi C-10 sous leur forme initiale.

5. Jeunesse sacrifiée. Un plus grand nombre de jeunes Canadiens passeront des mois dans des centres de détention avant leur procès, grâce au projet de loi C-10. Le passé a démontré que les jeunes à risque apprennent ou renforcent des comportements criminels dans les centres de détention; c'est seulement quand ils sont orientés vers des options communautaires qu'ils sont plus susceptibles d'être réformés.

6. Punitions au-delà du crime. Le slogan d'une des propositions législatives était Loi mettant fin à la détention à domicile de contrevenants violents et dangereux, mais en fait le projet de loi C-10 supprimera aussi les peines avec sursis pour les délinquants coupables d'infractions mineures et d'infractions contre les biens et les enverra en prison. Est-ce une bonne façon d'utiliser l'argent des contribuables que de dépenser environ 100 000 $ par année pour incarcérer quelqu'un inutilement?

7. Formation de prédateurs. Le projet de loi C-10 contraindrait les juges à incarcérer des personnes, dont les infractions et la situation ne justifient manifestement pas un emprisonnement. Les responsables des prisons auront davantage de latitude pour faire abstraction des droits de la personne des prisonniers, et discipliner et contrôler les détenus sans recourir aux moyens les moins restrictifs. Presque tous les détenus réintégreront un jour la société. Voulons-nous qu'ils y reviennent en voisins ou en prédateurs endurcis par leur expérience en prison?

8. Surcharge du système de justice. Des peines plus longues et plus dures accroîtront les pressions s'exerçant sur un système de justice qui est déjà au bord du point de rupture. Les tribunaux et les procureurs de la Couronne sont débordés, les programmes d'aide juridique sont sur le point d'atteindre leurs limites et les corps policiers n'ont pas les ressources voulues pour effectuer leur travail convenablement. Le projet de loi C-10 ne règle aucun de ces problèmes et les aggravera sensiblement.

9. Victimisation des plus vulnérables. Quand des peines minimales obligatoires remplaceront les peines avec sursis, des personnes de communautés isolées, rurales et nordiques seront envoyées loin de leur famille pour purger leurs peines. Les Autochtones canadiens font déjà jusqu'à 80 % des détenus dans des établissements pénitentiaires des Prairies, une honte nationale que le projet de loi C-10 aggravera encore.

10. Combien en coûtera-t-il? Faute d'estimation fiable des coûts des recommandations, il n'y a aucun moyen de déterminer de façon responsable les implications financières du projet de loi. Qu'est-ce que les Canadiens devront sacrifier pour payer la note de ces initiatives? En vaudront-elles la peine?

Les Canadiens méritent une information précise sur le projet de loi C-10, ses coûts et ses effets. Ce projet de loi transformera la façon dont notre pays confronte la criminalité à chaque étape de notre système de justice. Il représente un énorme recul, et au lieu de donner priorité à la sécurité publique, il met plutôt l'accent sur le châtiment par-dessus tout. Il va à l'encontre de notre protection, de notre sécurité et, en dernier ressort, de ce qui est véritablement canadien" (L'Association du Barreau canadien, 2011).

L'Association du Barreau canadien. (2011).
10 raisons de s'opposer au projet de loi C-10 Bill C-10. Ottawa, ON: Auteur. Récupéré de http://www.cba.org/cba/blastemail/pdf/10_reasons_to_oppose_fr.pdf

RÉIMPRIMÉ AVEC L'AUTORISATION DE L'ASSOCIATION DU BARREAU CANADIEN

AT THE CROSSROADS

SNAPSHOT REACTIONS - Bill C-10 has Canada at a crossroads. These impending changes to the Canadian criminal justice system have many experts and politicians speaking out in Canada and the U.S.

À LA CROISÉE DES CHEMINS

APERÇUS DE RÉACTION - Le Canada se trouve à la croisée des chemins avec le Projet de loi C-10. Plusieurs experts et politiciens au Canada et aux États-Unis se prononcent sur ces changements imminents au système de justice pénale du Canada.

THE U.S. EXPERIENCE WITH GET TOUGH ON CRIME

One such state is California, which implemented its 'tough on crime' stance in the 90's. This situation is well illustrated in Stefan Horodeckyj's article, Get Smart on Crime - Not Tough on Crime, (see page 13 of this issue), which provides a vivid snapshot of California's raucous ride down the road of prison overcrowding and human rights violations that would culminate in a court-mandated release of almost 40 000 incarcerated individuals.

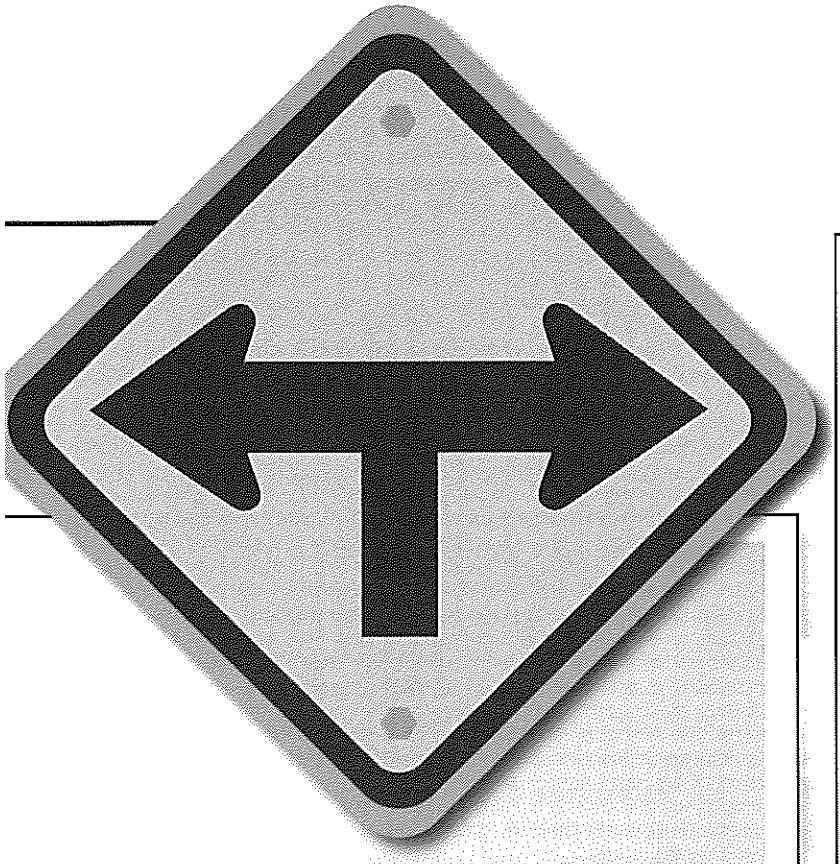
A similar experience in Texas has "[c]conservatives in the United States' toughest crime-fighting jurisdiction... say[ing] the Harper government's crime strategy won't work..." In fact, '"Republican governors and state legislators in such states of Texas, South Carolina, and Ohio are repealing mandatory minimum sentences, increasing opportunities for effective community supervision, and funding drug treatment because they know it will improve public safety and reduce taxpayer costs,'" said Tracy Velázquez, executive director of the Washington-based Justice Policy Institute... If passed, C-10 will take Canadian justice policies 180 degrees in the wrong direction, and Canadian citizens will bear the costs" Milewski, T. (2011).

Milewski, T. (2011). Texas conservatives reject Harper's crime plan: 'Been there; done that; didn't work,' say Texas crime-fighters. CBC News. Retrieved from http://www.cbc.ca/news/politics/story/2011/10/17/pol-vp-milewski-texas-crime.html

THE CANADIAN EXPERIENCE LEADING UP TO THE ENACTMENT OF BILL C-10

Howard Sapers, Canada's Correctional Investigator, noted during an interview with Ottawa's *The Hill Times* that Canadian federal penitentiaries are "already overcrowded under ...the majority-governing Conservatives... prison policy and tough-on-crime laws" (Naumetz, T. 2011). In fact, Mr. Sapers calls Bill C-10 a "controversial crime mega-bill the government is forcing through parliament" that "will exacerbate prison overcrowding, [and] create more 'complex' penitentiary populations". Mr. Sapers also voiced concern that " despite a... rush with the crime legislation, Bill C-10, there has been no 'roll up' of costing or implications of a range of crime and penal measures the Conservatives have already overseen since 2006" (Naumetz, T. 2011).

According to Mr. Sapers, "What we're seeing is we're seeing more people being sent to penitentiary and typically now staying longer, and



perhaps at higher security levels, and so our prisons are becoming more crowded and they're becoming more crowded with some particular populations... We're seeing an increase in the over-representation of aboriginal offenders, we're seeing a dramatic increase in the rate of incarceration for female offenders, we're seeing an increase in the number of offenders going to penitentiary with significant mental illness... The population is not just increasing, but the populations within penitentiaries are becoming more complex and, in some ways, more difficult to manage and program for" (Naumetz, T. 2011).

The correctional investigator, "who has the status of ombudsman for federal offenders", also told *The Hill Times* that Bill C-10 "creates some additional mandatory minimums, some additional changes in the Corrections and Conditional Release Act that I think will increase even more the number of people going to penitentiary, and that is going to compound the problem" (Naumetz, T. 2011).

Naumetz, T. (2011). Canada's federal prison ombudsman warns omnibus crime bill will exacerbate prison overcrowding, create more 'complex' penitentiary populations. *The Hill Times*. Retrieved from http://www.hilltimes.com/news/politics/2011/12/08/canada

UN TRAVAILLEUR SOCIAL AU QUÉBEC EXPRIME SES PRÉOCCUPATIONS POUR LES JEUNES

Au Québec, un travailleur social exprime ses préoccupations pour les jeunes impliqués dans le système de justice pénale avec "le virage inutilement punitif" que veut prendre le gouvernement conservateur par son projet de loi C-10. Il note que l'examen "d'une cinquantaine d'études dans le cadre d'une méta-analyse a démontré que l'incarcération ne réduit pas la récidive... En fait, il semblerait plutôt que ce soit le contraire: les longues peines étant associées à une augmentation de 3 % de la récidive". Il dit que le taux de criminalité du Québec "fait bonne figure... car il a misé sur une approche orientée vers des programmes de prévention et de réhabilitation évalués". Selon M. Genest, plusieurs "facteurs associés à la criminalité, tels que le chômage, le décrochage scolaire, la violence familiale, les pratiques parentales inadéquates, la toxicomanie et la santé mentale de nos jeunes, devraient faire l'objet d'un meilleur soutien de nos gouvernements à travers les communautés et les différents organismes d'aide à l'enfance" (Genest, 2011).

Genest, L. (2011) Avec C-10, comment avancer en arrière... Le Devoir.com. Extrait de http://www.ledevoir.com/politiquecanada/337086/avec-c-10-comment-avancer-en-arriere

THE OFFICE OF THE CORRECTIONAL INVESTIGATOR

"It is also important to understand that the serious, if unintended, effects of prison crowding reach far beyond the provision of a comfortable living environment for inmates. Aside from the immediate issue of physical capacity, prison crowding has negative impacts on the system's ability to provide safe and secure custody. It is well understood that prison crowding can lead to increased levels of tension, frustration and institutional violence, which can jeopardize the safety of staff, inmates and visitors. According to CSC data, the number of major institutional incidents increased during the reporting year— including preventable deaths in custody, violent assaults, serious bodily injury and use of force. As correctional populations increase, timely access to offender programs, treatment and meaningful employment opportunities measurably diminish, resulting in delays for safe reintegration into the community and further exacerbating both population management and cost pressures. ... Given high rates of mental illness, drug addiction, violence and criminal gang membership, it is difficult to see how double-bunking can be viewed as a correctionally appropriate or sustainable solution to crowding pressures in either the short or medium terms" (Extract from the Correctional Investigator's Message, 2010).

*Annual Report of the Office of the Correctional Investigator 2009-2010.*Ottawa, ON: Author. Retrieved from http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20092010-eng.aspx

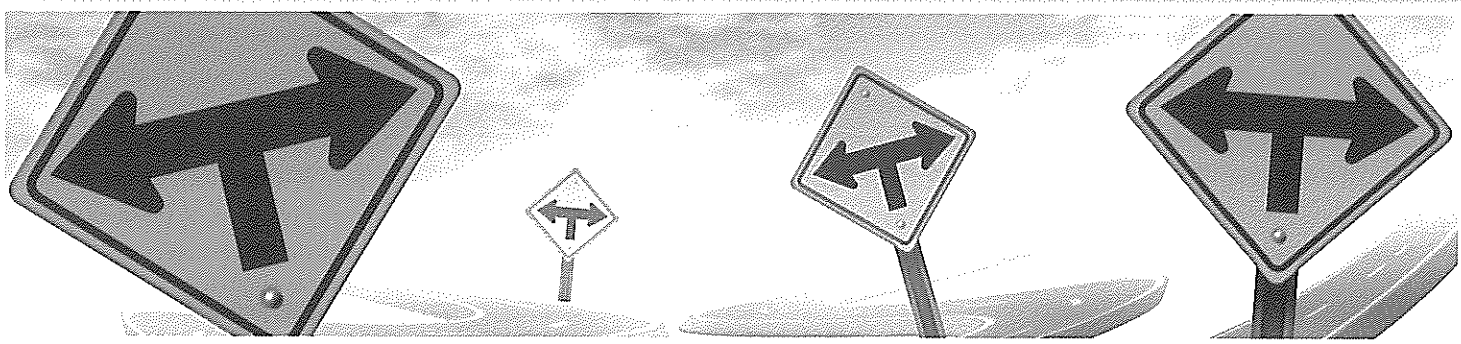
LE BUREAU DE L'ENQUÊTEUR CORRECTIONNEL

"Il est également important de comprendre que les effets graves, bien qu'involontaires, du surpeuplement carcéral sont loin d'offrir aux détenus un milieu de vie confortable. Mis à part le problème immédiat de la capacité physique, le surpeuplement des pénitenciers a des répercussions négatives sur la capacité du système d'assurer une incarcération sécuritaire. Il est connu que le surpeuplement carcéral peut accroître le niveau de tension, la frustration et la violence institutionnalisée au point de mettre en péril la sécurité du personnel, des détenus et des visiteurs. D'après les données du Service correctionnel du Canada (SCC), le nombre d'incidents institutionnels graves a augmenté durant l'année sur laquelle porte le rapport – y compris les décès en établissement évitables, les voies de fait, les blessures graves et le recours à la force. Au fur et à mesure que les populations carcérales augmentent, l'accès opportun aux programmes pour les délinquants, aux traitements et aux possibilités d'emploi intéressantes diminue dans une certaine mesure, ce qui retarde la réinsertion sociale « sans risque » des délinquants dans la collectivité et augmente encore plus la population à gérer et les coûts" (Extrait du Message de l'Enquêteur correctionnel, 2010).

Rapport annuel du bureau de l'enquêteur correctionnel 2009-2010. Ottawa, ON: Auteur. Récupéré de http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20092010-fra.aspx

The Correctional Investigator Canada

L'Enquêteur correctionnel Canada



A STATEMENT ON BILL C-10 FROM THE SCHIZOPHRENIA SOCIETY OF ONTARIO

"As Bill C-10, Safe Streets and Communities Act, is being considered by the Senate, the Schizophrenia Society of Ontario calls for the Federal and Provincial Governments to address the dire situation of people with mental illness who are held in jails and detention centers across Canada. We are particularly concerned that our government's approach to criminal justice policy will further increase the number of people with mental illness in our correctional settings, rather than improve access to mental health treatments and supports.

People with mental illness come in contact with the law at increased and disproportionate rates and are overrepresented in the federal and provincial correctional institutions. At the same time, in correctional settings people with mental illness are less likely to receive treatment and services and are more likely to be placed in segregation.

Everyone has a right to health care, including people with mental illness who come in contact with the law. It is hence imperative to ensure that comprehensive mental health services and supports are available for all people in our criminal justice system. The Schizophrenia Society of Ontario (SSO) agrees with the recommendations put forth by the Canadian Psychiatric Association and takes the position that the federal and provincial correctional systems must enhance mental health services and supports for inmates, parolees and probationers".

Please refer to the full statement, People with Mental Illness in Federal and Provincial Correctional Settings, at http://www.schizophrenia.on.ca/images/stories/SSO_position_on_mental_illness_in_corrections_December_15_2011.pdf

SCHIZOPHRENIA
SOCIETY OF ONTARIO
A REASON TO HOPE

THE BILL DOES NOT FIT THE CRIME!

WHY SPEND MILLIONS OF DOLLARS ON A CRIME PROBLEM THAT DOES NOT EXIST?

BY J. A. HOLMGREN, PhD

Janne Holmgren is an associate professor in the Department of Justice Studies at Mount Royal University, Calgary, Canada.

Bill C-10 should not be accepted as a means to address the so-called crime problem. Bill C-10 (known as the *Safe Streets and Communities Act*) is an omnibus bill that pulls together nine different previously unsuccessful bills in the hope that they may pass more easily as a group. This move, however, is a simple knee-jerk reaction to crime. It is time for the Harper government to look at the research related to crime and quit its sensationalist and fear-mongering ways of acquiring support for a bill that does not fit the crime. We must look to the experts and quit believing that our declining crime rate is a myth!

The so-called crime problem is actually a social problem that cannot be addressed by increasing the size of or building more prisons, or by mandating incarceration for minor and non-violent offences and thus making the reintegration of the convicted even more difficult.

This past week the headlines in Calgary read that one Harold Smeltzer had his parole revoked because he had rented a video that included sexual content. The media and the police in Regina will not disclose the name of this video. The National Parole Board merely notes that the video did have sexual content, coarse language, and was "not recommended for children." Let's face it, in today's world, what video is appropriate for children?

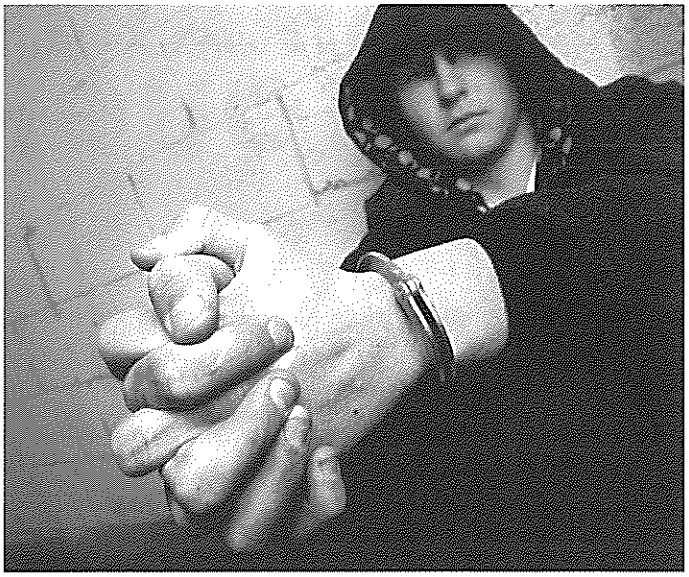
Harold Smeltzer, 56, had been on day parole since 2008 after serving 27 years in prison for killing five-year-old Kimberley Thompson of Calgary in 1980. The National Parole Board of Canada had noted that Smeltzer was a high risk to re-offend, as he had not been successful at obtaining employment after the granting of his day parole. Interestingly, the focus here is not why Smeltzer is unable to re-integrate into society. The reason for this misguided focus may be the fact that the correctional system and justice system are generally lacking in the area of re-integration into society.

Bill C-10 will insure that the oft-marginalized youth in custody will remain in custody for longer periods of time and perhaps even serve life sentences. As an example, in Steuben County, New York in 1993, one Eric Smith, at the age of 13, killed Derrick Robie, aged five. This sadistic and unprovoked killing led to major changes in American law. Eric Smith, a tormented and perhaps somewhat odd-looking fellow, had endured many years of bullying and seclusion within the community and, in an act of rage, killed a much younger boy. Eric Smith, at the age of 13, was given a sentence of nine years to life; however, grass-roots campaigns, not to mention the victim's father, pushed for changes that would lengthen the prison sentence for children who kill. Penny's Law was thus passed and sought to eliminate the sentencing distinction between juveniles and adults.

Possibly as a result, Eric Smith has been denied parole five times since he killed Robie. Thus far, Eric Smith has served a sentence longer than most adult murderers of children or adults in both Canada and the United States. The greater issue here is that no one has ever asked the most important question: Why did Eric kill? In the United States, the concept of guilt and innocence comes down to the single issue of whether or not the suspect knew right from wrong. Of course, the notion of right and wrong is a much more philosophical and developmental issue; however, such an evaluation can also not be conducted in a vacuum. The reason why is an area which is evaluated in Canadian Criminal Law when trying to establish culpability.

The government seems to be trying to sell Canadians the *Safe Streets and Communities Act* based upon a response to a few cases that have received more publicity than warranted. Young children who kill other children or their families are NOT an epidemic in Canada! Currently, the Calgary Young Offenders Centre (CYOC) houses an average of 11 young persons in their Intensive Rehabilitative Custody and Supervision program (IRCS). These young persons have been found guilty of causing or attempt to cause serious bodily harm for which offence an adult would be liable to imprisonment for a term of 14 years or more. The IRCS program consists of enhanced treatment/rehabilitation with a focus on successful reintegration into the community. The lengthier sentences for youth proposed under Bill C-10 will only increase the time young offenders are remanded in custody before receiving sentences. As it stands now, only 30% of those at CYOC are actually sentenced. *The Youth Criminal Justice Act* (*YCJA*) lists 12 sanctions for youth who become involved in the criminal justice system, and incarceration is the last and final option. If, in fact, such a small percentage of our youth require enhanced and intensive supervision due to a violent crime, the cost of Bill C-10 is unjustified as it is simply another expensive and knee-jerk response.

Bill C-10 is based on a false belief that there is an increase in violent crime and that Canadian society is becoming more violent. These beliefs are not based on fact and their propagation an obvious cause for concern. Research shows that an increasing number of persons who could potentially become jurors believe that the criminal justice system in Canada works the way it does on CBS's *CSI* and its spin-offs *CSI-Miami*,



CSI: Las Vegas, and *CSI: New York*. In the academic world, such perceptions, such beliefs, are referred to as an *effect*. The same potential jurors believe that DNA evidence should be used in all sexual assault cases (see Holmgren & Fordham, 2011). Both responses seem to be related to the amount of television they are watching, and this is what we coin the "CSI Effect". It is not fact, and is based solely on belief. Imagine if we actually ran our criminal justice system based solely on belief?

If there is a question about crime and how offenders should be rehabilitated, then it is up to our society to seek the facts. Thus far, it seems that Harper's government is not interested in delivering facts to the Canadian population, only beliefs. As Canadians, we are being asked to stick our heads in the sand and believe that we have a horrible crime problem. Rather, we could look at the facts, which reveal that the tried-and-failed tough-on-crime bills are not helping our neighbours across the border and that the most effective rehabilitation outcomes are achieved in socially supported corners of the world such as, for example, Scandinavia, where the bill fits the crime.

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GET "SMART" ON CRIME NOT "TOUGH" ON CRIME

SUPREME COURT OF THE UNITED STATES

Syllabus

BROWN, GOVERNOR OF CALIFORNIA, ET AL. v. PLATA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE EASTERN AND NORTHERN DISTRICTS OF CALIFORNIA

No. 09–1233. Argued November 30, 2010—Decided May 23, 2011

California's prisons are designed to house a population just under 80,000, but at the time of the decision under review the population was almost double that. The resulting conditions are the subject of two federal class actions. In Coleman v. Brown, filed in 1990, the District Court found that prisoners with serious mental illness do not receive minimal, adequate care. A Special Master appointed to oversee remedial efforts reported 12 years later that the state of mental health care in California's prisons was deteriorating due to increased overcrowding. In Plata v. Brown, filed in 2001, the State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights and stipulated to a remedial injunction. But when the State had not complied with the injunction by 2005, the court appointed a Receiver to oversee remedial efforts. Three years later, the Receiver described continuing deficiencies caused by overcrowding. Believing that a remedy for unconstitutional medical and mental health care could not be achieved without reducing overcrowding, the Coleman and Plata plaintiffs moved their respective District Courts to convene a three-judge court empowered by the Prison Litigation Reform Act of 1995 (PLRA) to order reductions in the prison population. The judges in both actions granted the request, and the cases were consolidated before a single three-judge court. After hearing testimony and making extensive findings of fact, the court ordered California to reduce its prison population to 137.5%of design capacity within two years.

BY STEFAN HORODECKYJ, JD

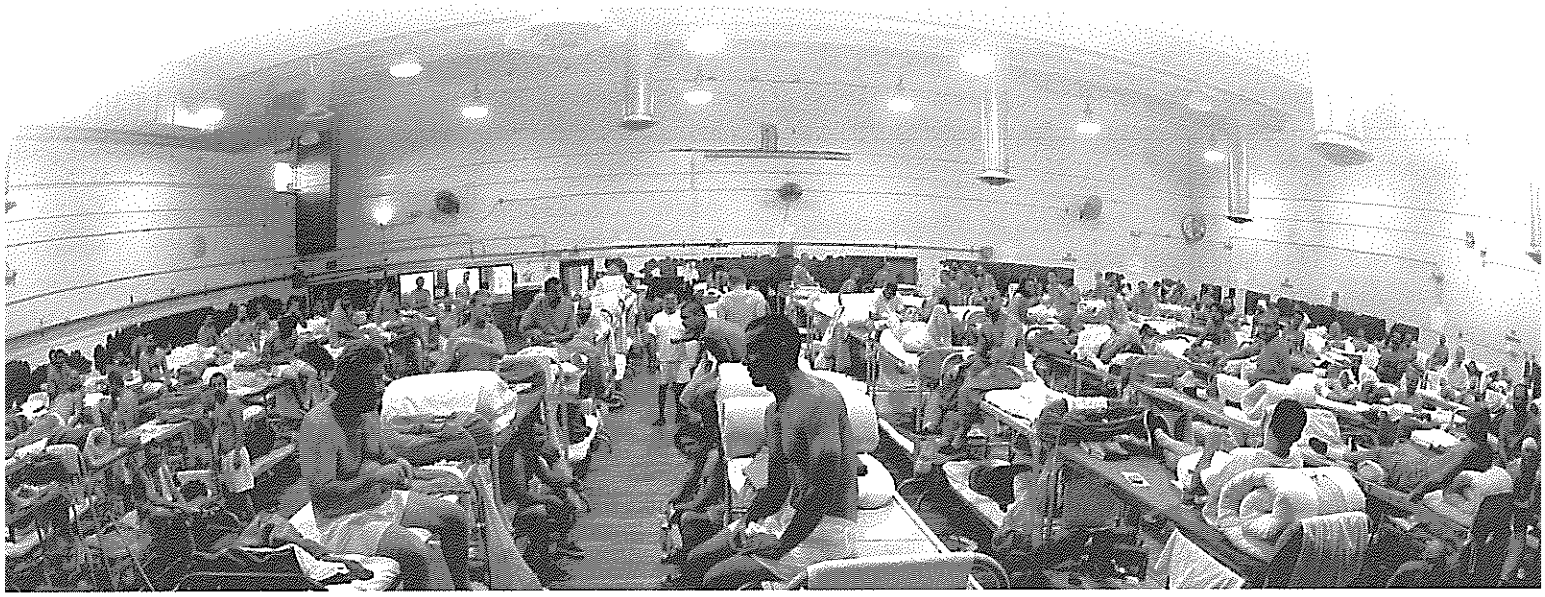
The author has worked in the criminal justice system in Canada for the last 40 years in different capacities: correctional officer, counsellor in a prison, educator, probation/parole officer, and criminal lawyer. He presently volunteers, as a facilitator with a support group for adults sexually abused as children, at "The Gatehouse"- a charitable, non-profit organization in Toronto, Ontario. As well, he is a member of the Board of Directors with "The Bridge"- a prison ministry in Brampton, Ontario.

INTRODUCTION

The Federal Government of Canada has decided to get "tough" rather than "smart" on crime with its looming Omnibus Bill C-10 (known as the *Safe Streets and Communities Act*), despite convincing evidence that in many cases locking up offenders, especially for lengthy periods, is not a viable solution for rehabilitating offenders and protecting society.

This approach to crime conjures up such long-standing slogans as "prisons are 'universities' for criminals" and "prisons are 'concrete wombs' for the prisoners". The former suggests that criminal values are often reinforced by more hardened criminals. The latter intimates that prisoners often become institutionalized when they serve lengthy prison sentences and thus have a much harder time reintegrating into society. In these two scenarios, both the offender and society are in a more precarious situation. The offender has not been rehabilitated, and the protection of society is undermined.

Perhaps the greatest tragedy of the Harper government's decision to get "tough" on crime is that it is essentially a punitive approach to dealing with offenders. It would appear to be common sense that when we punish someone, with little or no regard for his or her self-worth and the harm this incarceration has on the offender's family, we are destroying the offender's spirit and will to change. Without this will to change, there is little rehabilitation of the offender and society is not any safer after the prisoner's release into the community.



© The picture above came from California Department of Corrections website.

We should (rather) be investing our energy and resources on rehabilitating the offender, ascertaining the causes of crime, preventing crime and assisting his family. As the following analysis of the landmark case of *Brown v. Plata* shows, it would be prudent for Canadian federal politicians to revisit and change their philosophy of supporting longer and harsher prison sentences, one of the aims of Bill C-10.

One of the most powerful arguments against more punishment and lengthier prison sentences, and in support of more rehabilitative/non-custodial sentences in many criminal cases, may be found in the recent US case of *Brown v. Plata*. The decision in this case was handed down on May 23, 2011 by the Supreme Court of the United States. In the pages to follow, I will highlight the decision delivered in this case and the effect it will have on the State of California. Subsequently, I will deal with the probable impact of this watershed legal decision on corrections in Canada.

BROWN (GOVERNOR OF CALIFORNIA) V. PLATA: DOCKET NUMBER U.S. 09-1233 — VOLUME 563 (05/23/2011)

This was an appeal by the State of California to the Supreme Court from a three-judge district court order forcing California to substantially reduce its prison population. The Supreme Court upheld the decision of the lower court. In doing so, the High Court struck a blow to California's prison system in a 5 to 4 decision.

The legal issue the Court dealt with was whether California violated the US Constitution's Eighth Amendment prohibition of "cruel and unusual punishments". The plaintiffs alleged that the overcrowding in state-run prisons, the damages resulting from the negligent care of inmates with serious mental problems, and the damages arising from the negligent care of inmates with serious medical problems, did indeed violate the prisoners' Eighth Amendment rights regarding "cruel and unusual punishments".

The relevant facts in this case are as follows: at the time of the trial, California's correctional facilities held some 156,000 inmates. This was nearly double the number that California's state-run prisons were designed to hold (80,000). As many as 200 prisoners lived in a gymnasium, monitored by as few as two or three correctional officers. Also, as many as 54 prisoners shared a single toilet. As well, there were backlogs of more than 700 prisoners awaiting simple doctor appointments.

Overcrowding had overcome the limited resources of prison staff, imposed demands well beyond the capacity of the prisons' medical and mental health facilities, and created unsanitary and unsafe conditions that made the provision of care difficult or impossible to achieve. Prisoners in California with serious mental illness did not receive minimal acceptable care. Prisoners suffering from physical illness also received substandard care.

During the pendency of this appeal, the State reduced the population by at least 9,000 inmates. This, however, was unacceptable.

IMPLICATIONS OF *BROWN V. PLATA* FOR THE STATE OF CALIFORNIA

In *Brown v. Plata*, the Supreme Court of the United States held that the State of California violated prisoners' Eighth Amendment rights regarding "cruel and unusual punishments" by allowing the State prisons to be overcrowded and resulting in substandard medical and mental health care and treatment of prisoners.

Therefore, the U.S. Supreme Court affirmed the judgment of the lower, three-judge district court and ordered the State to reduce its prison population by (a further) 37,000 persons, to complete this process within two years, and to commence without further delay.

The Supreme Court stated that "living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and develop overt symptoms". For years the medical and mental health care provided by California's state-run prisons had fallen short of minimum constitutional requirements and failed to meet even the most basic health-care needs of prisoners.

The Supreme Court also stated that the three-judge district court credited substantial evidence that prison populations can be reduced in a manner that does not increase crime in society to a significant degree. In fact, some evidence indicated that reducing overcrowding in California's prisons could improve public safety.

The Supreme Court agreed with the District Court's finding that "the construction of new facilities, in theory, could alleviate overcrowding, but the Court found no realistic possibility that California would be able to build itself out of this crisis". In the opinion of the District Court, this would be a very expensive initiative for California and the Supreme Court concurred.

The U.S. Supreme Court enunciated that the State could employ non-custodial measures to reduce its prison population, including good-time credits in prison, the diversion of low-risk offenders and technical parole violators to community-based programs such as drug treatment, day reporting centres and electronic monitoring; sentencing reform, and other means to be determined by the State.

Justice Anthony M. Kennedy, who delivered the majority opinion of the Supreme Court, stated: "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society".

Finally, the U.S. Supreme Court criticized the State government, stating that for the last 12 years it lacked the political will to solve its prison problems on its own.

IMPLICATIONS OF *BROWN V. PLATA* FOR CORRECTIONS IN CANADA

In the 1990's the State of California adopted the "Get Tough on Crime" policy. This meant tougher sentences for criminals and longer prison sentences. Therefore, in the last 12 years the California corrections experience has been extreme overcrowding and substandard medical and mental care services for the prisoners in state-run facilities. In light of the case of *Brown v. Plata*, it would be prudent for Canadian federal politicians to revisit and change their philosophy of supporting longer and harsher prison sentences, one of the aims of Bill C-10, so as to prevent the aforementioned prison crises from arising in Canada.

Brown v. Plata emphatically asserted that severe overcrowding and substandard medical treatment of prisoners in state-run correctional facilities in California had resulted in a violation of the prisoners' Eighth Amendment rights regarding "cruel and unusual punishments". This constitutional guarantee is virtually identical to Canada's constitutional guarantee, enunciated in Section 12 of the *Canadian Charter of Rights and Freedoms* (1982), which reads as follows: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment". Therefore, the federal, provincial and territorial governments could be found by our Courts to be in violation of this guaranteed right if Canada follows the California example and is similarly unable to build itself out of such a crisis.

Brown v. Plata presented various ways of dealing with the issue of overcrowded conditions in prisons. One suggestion made by the U.S. Supreme Court was to implement positive sentence reform so that prisoners would spend less time behind bars. Bill C-10, *inter alia*, deals with sentence reform, but it will lead Canada in the exact direction that the U.S. have learned is the wrong way to go. For example, Bill C-10 creates a mandatory minimum sentence of nine months incarceration for growing as little as six or more marijuana plants. As well, this same sentence would be mandatory for the giving or selling of one marijuana cigarette. This means that provincial correctional authorities would lock up more offenders. Hence, the inmate population would grow substantially. The province of British Columbia would probably be hit the hardest, since there are a greater number of *'grow ops'* in that province than in any other part of Canada.

It is important to recognize that the U.S. National Association of Criminal Defence Lawyers urged the Government of Canada in 2010 to abandon its plan to establish mandatory minimum sentences for drug offences, since their experience with mandatory minimum prison sentences for drug offenders has proven disastrous. This U.S. Association stated that "the substantial costs of incarcerating drug offenders would be better used to fund drug treatment and harm reduction programs, alternatives to incarceration, employment opportunities and human services".

POSITIVE SENTENCING REFORMS

With respect to drug treatment programs and alternatives to incarceration, the writer would support the enactment of federal criminal legislation that would require the judge to consider the appropriateness of "Drug Treatment Court" (DTC), before he/she considers sentencing the offender to prison time. Currently, the offender must enter a guilty plea and then may voluntarily apply for admission into the drug treatment program offered by the DTC. Upon completion of the drug treatment program, the participant may receive a non-custodial sentence. This sentence may include a period of probation, restitution and/or a fine.

DTC's are judicially supervised court dockets that handle the cases of non-violent offenders who are severe and long-term substance abusers. 'Substance abuse' includes both legal and prescription drugs, as well as alcohol. In DTC, the judiciary, prosecution, defence bar, probation, law enforcement, mental health, social service, and treatment programs work together to help offenders find restoration in recovery and become productive citizens.

It is important to note that the USA has been operating DTC's since 1989. They are currently found in all 50 states. As well, in Canada, DTC's have been operating since December 1, 1998, with the first one having been established in Toronto. It is noteworthy that countries such as Britain, Jamaica, Brazil, Ireland and Australia have also adopted the DTC model.

According to scientific studies, recidivism rates for those who attended DTC were lower than for those who did not attend. For example, a 2006 study of nine courts in the State of California found that the re-arrest rates over a four year period were 29% for Drug Court participants (and only 17% for Drug Court graduates) as compared to 41% for similar drug offenders who did not participate in DTC. Hence, sentencing appropriate offenders to DTC appears to be a positive thing in terms of rehabilitating the offender and protecting society.

Another example of positive sentencing reform to decrease the number of offenders being imprisoned in Canada is that of increasing the maximum period of probation from the current three years to five years, as in the USA. As well, if there are appropriate and sufficient community and probation programs, and if provincial governments ensure that probation officers have the knowledge, skills, resources and manageable caseloads required to closely and diligently supervise offenders, then the chance of offenders breaching probation and being returned to prison is reduced. In connection with this, an idea the Canadian legislators might want to consider, is the type of legislation that (former) Governor Schwarzenegger passed in 2010: rewarding probation departments for keeping criminals out of prisons. This might prove to be a motivating force for new ideas and strategies to keep offenders successfully on probation and out of prison.

PRISON POPULATION REDUCTIONS AND PUBLIC SAFETY

Brown v. Plata accepted the evidence presented before the three-judge district court indicating that reducing the prison population could improve public safety. In other words, a convicted person serving his or her sentence in the community may, in many cases, not be a significant danger to the public. The Supreme Court of the United States also stated in its judgment that the construction of new and larger prisons would be a major financial drain on the governments. If Canada adopts this notion, less financial resources would be allocated by governments for building new prisons and more monies could be directed to expanding and supporting community-based programs for offenders and ex-offenders, without compromising public safety.

Brown v. Plata stressed that, as an alternative to more prison sentences and longer terms of incarceration, the government should focus its attention and energy on the following endeavours: expanding existing community treatment programs, e.g. substance abuse, anger management, educational and employment programs, etc.; establishing new community programmes where there is a need; making greater use of electronic monitoring and day-reporting centres; and employing other means as determined by the State. In fact, this was the approach the Canadian Federal Government favoured in the past, prior to the drafting of Bill C-10. Hence, based on the example of *Brown v. Plata*, Canadian governments might want to consider supporting and expanding existing programs and establishing new programs in parts of Canada where there is a need.

Brown v. Plata also endorses the principle that judges should have discretionary powers for sentencing. The current *Criminal Code of Canada* sentencing provisions echo this principle. These provisions allow the judge to use fairly wide discretion in sentencing offenders. The judge may consider, *inter alia*, where appropriate, community sentences alone (e.g. probation), or a short prison sentence, or a short prison sentence combined with a community sentence. Unfortunately, Bill C-10 deviates from this principle in that it prescribes mandatory minimum sentences for certain drug- and gun-related offenses.

In light of *Brown v. Plata*, it is fair to say that the purposes of sentencing, to paraphrase part of Section 718 of the *Criminal Code of Canada* (*CCC*), are as follows: "assisting in the rehabilitation of offenders; providing reparations for harm done to victims or to the community; promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community". As guidelines, several sentencing principles are set forth in section 718.2 of the *CCC*. As with the U.S. *Brown v. Plata*, these (*CCC*) sentencing principles should have priority: "(d) an offender shall not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders".

In fact, Section 717 (1) of the *CCC*, in support of the principle of imprisonment as a last resort, introduces "Alternative Measures", to be used in appropriate cases. In Toronto, for example, in the Ontario Court of Justice, judges in certain cases can avail themselves of a variety of available diversion programs. The two most often used are the Drug Diversion and Mental Health Diversion programs. If the offender completes the program satisfactorily, the judge will dismiss the charge or place the offender on probation.

Similarly, the 2003 Canadian federal *Youth Criminal Justice Act (YCJA)* enunciates essentially the same sentencing purposes and principle for youth

(12-17 years old) as does the *CCC* for adults. Rehabilitation and reintegration of youth into society are paramount, and incarceration of the offender should be the last resort. In addition, Section 6 (1) of the ***YCJA*** gives police the option of using "Extrajudicial Measures" in appropriate cases, instead of charging the youth and creating the chance that he or she will be incarcerated at some point during the youth justice process. The police can verbally 'warn' the young person, or in more serious cases the police can 'caution' (if a program for this is established), or refer the young person to a program in the community that may assist the young person to not commit offences.

CONCLUSIONS

There are several important implications of the case of *Brown v. Plata*, for the State of California and for corrections in Canada. These include the following: prisons on the whole are ineffective; prisons are expensive; lengthy prison sentences are more harmful than shorter ones; issues of overcrowding, physical and mental health in prisons are very important; judges should have more discretion in certain cases as to whether incarceration is a fair and appropriate sentence; and more funding should be directed at crime prevention, at dealing with the causes of crime, and at providing rehabilitative programs for offenders.

In light of *Brown v. Plata*, it is the author's view that it would be prudent for the Canadian government to revisit its punitive approach to the care of offenders and the protection of society and alter its course from one of "getting tough" on crime, to one of "getting smart" on crime. On this latter course, respect, compassion and rehabilitation should be the driving forces for positive change in offenders and for the protection of society.

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CRIME AND PUNISHEMENT? OR HARM AND REDRESS?

Reflections on Restitution and Community Service (CS) as Desirable Alternatives in Sentencing Practice

*Continued from Volume 26 No. 3 of the *Justice Report*

BY SVEINN A. THORVALDSON

PRINCIPLE OF REDRESS

The principle of redress was described by Hans Mohr at the *Symposium* as "the oldest and most basic notion of law in the face of harm". The question therefore arises: just why has there been such difficulty establishing it (and specifically its expression in the form of CS and restitution) as a modern response to a crime? It seems to be commonly observed that, with the gradual consolidation of power in central governments many centuries ago, common law procedure split into the two spheres of law we now know: the civil dealing with 'private' dispute resolution and the criminal dealing with 'violations of the peace of the realm'. Quite apart from the (controversial) question whether such a split is meaningful or justified, it meant in practice that, while redress continued to be *the* primary response to private wrongs, punishment (the deliberate intent to inflict pain) became *the* response to public wrongs. The familiar phrase *Crime and Punishment*, implying that the two are joined in a sort of natural symbiosis, was at that time literally true. Victims 'had their remedy' in a claim for 'damages' in the civil court, while money payment to the state became the *punitive* fine. Such 'punishment', used primarily for the purpose of intimidation, and thus unencumbered by any notions of fair and commensurate compensation, would of course nicely suit the political and financial interests of a dictatorial monarch or feudal lord. With respect to public service, such sanctions as transportation for work in the colonies, military service, and labour on public works, where the reparative or 'service' effects were both clear and intended, also were nevertheless justified primarily not as redress but as punishment (and, it appears, were usually administered accordingly!).

A crime came, in short, to be *defined* not simply by the nature of the harm – public or private – but *also* by the response to it, *i.e.*, a crime is a wrong we punish; a tort is a wrong we 'settle'. The reverse also becomes true. It is therefore hardly surprising that money payment by an offender to a victim is assumed to be "essentially a civil remedy"; *it would be so by definition.* Nor is it surprising that many criminologists, well versed in the horrors of early prison work programs, would consider CS "just another punishment" and fear its return as such. There seems, however, in fact to be no moral or legal *principle* requiring that monetary compensation must serve only the civil law or that public work programs, to serve the criminal law, must be regarded as a punishment or, nowadays, simply as a rehabilitative technique. The difference between the civil and criminal law surely turns not on the methods of enforcement employed but on the difference in their primary purposes. Thus redress as a response to wrongdoing, one might say, is neither 'civil' nor 'criminal' in itself; its character depends upon why it is used.

In any case, confining redress to the civil law *was to have huge consequences for sentencing practice*: it meant that the criminal court was left with only one serious method of doing justice (particularly for conventional offenders and the poor) - retributive punishment. The notion of crime in moral terms - as creating a 'debt to society' - endured, but it had to be paid in the coinage of some form of deprivation, and imprisonment was once regarded as the most efficient, the most fair, and the most humane, way to "make the punishment fit the crime". But things

changed. Punishment in general and imprisonment in particular were soon on a collision course with several interacting and powerful forces: a) utilitarian philosophy which rejected 'moral desert' as irrelevant to law enforcement; b) changing standards of 'social' or 'equal' justice; c) the clamor for the more humane treatment of offenders; and d) the soaring optimism of the new social sciences. (See here Michael Ignatieff's *A Just Measure of Pain*, 1978.) Retribution, in other words, both in principle and expressed in the form of imprisonment, came under attack as 'irrational', unjust to the poor, often appallingly cruel, and deaf to new findings about the *causes* of crime. (By the time I was a probation officer, retribution was usually considered not only inhumane but also 'unenlightened', "just another word for revenge", and of no practical use at all to society.) The "new penology" focused on the social, psychological, economic and political determinants of crime, and measured the effectiveness of sentencing methods in terms of short term recidivism rates, not relatively long term effects on the moral attitudes of offenders or the public. In political terms, the social idealism of the left and the moral idealism of the right, both of course valid in principle, soon came into sharp conflict about sentencing policy.

The result, for our purpose here, is that the principle of moral accountability for a criminal offence is itself soon in serious trouble. In the midst of a storm of conflicting ideologies, principles and methods, the court often finds itself on the horns of a familiar dilemma: if it chooses to do justice it is often obliged to impose an expensive prison sentence for offenders who don't need that level of control and may well be harmed by such humiliation and isolation from society; if it chooses a community sentence it risks being perceived as "soft on crime", as incompetent in terms of both moral principle and public safety. Positively, it may attempt to 'balance' competing sentencing aims. But such a solution often means a tortured compromise, doing nothing well and satisfying no-one. A sentence might avoid moral accountability entirely (e.g. probation) or it might compromise (e.g. a prison sentence which looks 'tough' but which is then subject to generous parole policies). In the process, the conception of the criminal law as a moral statement, and the court's role as moral educator, become, if not entirely absent, both ambiguous and weak. Victims, meanwhile, see this close-up and tend to judge the courts harshly. They notice the enormous care and expense a court will go to, albeit quite properly, to avoid the *injustice* of convicting the innocent, only to witness the same court, at the sentencing stage, to be thinking primarily of deterrent punishment or the rehabilitation of the offender.

The re-emergence of redress as a sentencing aim challenged all of that. Considered by some, in the '70s, as potentially a new ethic, ideology, or paradigm in sentencing theory, its promise was that justice can be done in a *positive* and compelling way in the community; that reparative sanctions can have significant potential as strong and credible methods of holding offenders morally accountable provided that they are properly interpreted as such; provided that the court has adequate powers to order them; and provided that they are administered in a flexible and humane way but also firmly and consistently, and if necessary for practical reasons, over considerable periods of time. Such sanctions might even, over time, assume some of the symbolic 'clout' which imprisonment now enjoys. Prisons might then be left to do what has been a dream of penal reformers for so long: control offenders likely to do serious harm, begin a process of rehabilitation followed by adequate control and assistance as required in the community, and, yes, as Conrad Black points out, do justice when nothing else but such punishment will calm our sense of moral outrage. Certainly there are practical limitations, constantly pointed out particularly with respect to restitution by conventional offenders. But even here, as victims are apt to say: "It's not so much the money; it's the principle of the thing".

We are now long past the limited choices the courts had in the '60s. The probation officer's job, I am told, is very different. Victims now have certain'rights', and at least are treated in a more considerate way. Certainly there have been several major sentencing policy enquiries since my time, resulting in the development of new methods of controlling and assisting offenders in the community, including electronic monitoring and home confinement. The seizure and confiscation of assets now seems routine where possible. But both CS and restitution continue to be damned with faint praise both in the Code and in practice, mainly, in my view, because of a failure in theory – *their (common) 'primary justifying aim' in sentencing has been misconceived.* We still see the same complaints we saw so often forty years ago: that neither is justice properly done nor are offenders capable of serious harm adequately controlled.

CONCLUSION

In summary it has been said that the moral sense is what makes us human, and that redress as a method of requiting harm goes back to the dawn of human society. Further, redress as a modern sentencing principle has long been advocated by many jurists and penal reformers. Its return in the '70s arguably has several implications for sentencing theory and practice: a) It supports the argument of the retributivists that vindicating and promulgating justice as a moral principle is essential in sentencing. b) It frees criminal law from the assumption that inflicting pain is the only serious way to do justice. c) It prompts a greater appreciation of the moral idealism implicit in the criminal law of a democracy, and the crucial role of the criminal court as a moral educator. d) It supports the position of moral psychology that dealing with *guilt* in a positive way not only does not conflict with the 'social integration' or 'mental health' of an offender but is essential to it. Conversely, it suggests that punishment is precisely the *wrong* way, in criminal sentencing as in child-rearing and education, to try to foster moral growth. A failure to demand some form of meaningful redress is, thus, to let the offender down. e) It exposes the principle of deterrence more clearly for what it is: intimidation by a superior power, the most primitive of social control methods, politically reactionary and at best a last resort in a democratic society. f) By offering the court methods of doing justice in a non-punitive and non-carceral way, it helps to reduce, and often to eliminate, the conflict between holding offenders morally accountable and providing for appropriate control. It may help the court to do both and avoid compromise so far as possible. g) It tends to separate (leaving the principle of deterrence aside) the two basic sentencing tasks: doing justice based upon what offenders *did*, and controlling them based upon what they *might do*, and calls for limits appropriate to each of these fundamentally different aims. The former is of course self-limiting – limited in principle by the gravity of the harm and the offender's culpability – while the latter requires more 'open-ended' or 'indeterminate' sentences, and therefore transparent administration and scrupulous oversight in a society such as ours which values individual liberty so highly.

Assuming that the federal government is right that there is a need to provide for better control of dangerous offenders and to maintain high moral standards in our society - notwithstanding the reported drop in crime rates - the question of course is how to achieve such commendable goals. As Conrad Black rightly argues, the effort to *strengthen* sentencing by requiring simply more certain and severe prison terms, with consequent reduction of judicial discretion is, to say the least, a familiar, conventional, unimaginative and very expensive response. But his criticisms of imprisonment primarily on grounds of effectiveness, compassion and cost are, I suggest, no longer enough. While they are certainly appropriate, they are not about doing justice, a primary aim in sentencing particularly for those who strongly believe in atonement for wrongdoing - as Black does, as he says, on both secular and religious grounds. Further, one needs to acknowledge the fact that imprisonment became a formidable method of law enforcement with enormous symbolic power a long time ago. It is the archetypal 'versatile' sentence serving all the usual sentencing aims at once – moral accountability, intimidation, control, and at least an attempt to help offenders become more law-abiding citizens – all things to all people and thereby attractive politically. If we are to compete with it, we obviously must invent semi-custodial and non-custodial alternatives *which credibly do at least some of the things prisons do*, and for significant groups of offenders, a fact so clearly recognized in the '70s. It is here that the development of conditional sentences in recent years, attempting to provide for both firm control and the rehabilitation of offenders in the community, has been so important. And it is here, I have argued, where reparative sanctions, properly interpreted, might compete with the symbolic power of the prison to do justice. Conrad Black is now calling, in this context, for another look, after so many years, at unpaid work programs for offenders, a sentence which has the potential to be at once strong, just, humane, relatively economical, and fair to the rich and poor alike. It is vital that such a sanction not be dismissed by the political right as simply further attention to the rights of offenders over the rights of us all, nor by the left as simply more humiliating and alienating punishment and a failure to focus upon the social causes of crime. It deserves the support of all parties, particularly those conservatives who see the criminal law not simply as the authority to enforce order, but as an expression of moral principle.

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DIRECTORY OF JUSTICE SERVICES
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